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# What is the European Union?

*Ilann Margalit Maazel\**

## I. INTRODUCTION

There is much debate about Europe these days. For the first time in European history, Germans, Italians, Spaniards, and citizens of nine other countries—some 302 million Europeans—are using the same currency, the euro. Within the European Community (“EC” or “Community”), created over forty-four years ago,<sup>1</sup> Europeans enjoy the free movement of goods, persons, services, and capital. They are protected from discrimination on the basis of their nationality and are “citizens” of the European Union (“EU” or “Union”).<sup>2</sup>

Yet, for all the talk of Europe, most “Europeans” still regard themselves as citizens of a nation state first, of a region or city second, and of Europe last, if at all. Many of the issues that most concern national governments—defense, security, and foreign policy—remain almost exclusively within the jurisdiction of national governments. There is no ques-

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1. The Treaty Establishing the European Economic Community (“EEC”), renamed the European Community (“EC”) in the 1992 Treaty on European Union, was signed on March 25, 1957 and went into force on January 1, 1958.

2. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11, *as amended by* Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter EC TREATY]. Article 14 of the EC Treaty provides, in relevant part: “The Community shall adopt measures with the aim of progressively establishing the internal market . . . [which] shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured . . . .” Article 39 provides for the “[f]reedom of movement for workers.” Article 17 provides: “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.”

All citations to the EC Treaty or the Treaty on European Union (“TEU”) can be found at the European Union’s official website: <http://www.europa.eu.int>. The 1997 Amsterdam Treaty renumbered almost all of the articles in the EC Treaty and the TEU. See Appendix A (Table of selected renumbered articles before and after the Amsterdam Treaty). Although many cases cited in this essay refer to the pre-Amsterdam Treaty article numbers, the essay refers to the article numbers as presently constituted in the EC Treaty and TEU.

tion that France, Great Britain, Germany, and other EU members remain autonomous, individual nation states.

And yet they are joined in union. What is this Union? An economic market that purports to provide "citizenship": created by treaty, yet quasi-constitutional. Neither nation nor federation nor economic cartel.

The legal debate over what the EU *is* lies at the surface of a critical political debate: what should Europe be? Those who advocate a European superstate tend to believe the EU is already a superstate. Those who oppose further European integration believe the EU is a limited, economic union of sovereign nations.<sup>3</sup> At the heart of this political debate lie issues dear to every European: issues of national identity, Europe's cultural and economic position in the world, and Europe's place in a history marred in the Twentieth Century by two brutal world wars.

Mindful of the political debate, but (largely) leaving that debate to others, this essay asks simply: what is this Union? What makes the documents creating the Union treaties, and what makes them constitutions? What stands between union and federation or nation? Through an analysis of the Union's history, institutions, and legal framework, this essay ultimately explores how the Union must be changed if, as European constitutionalists would have it, Europe is to move ever closer towards a common political future.

## II. TREATIES V. CONSTITUTIONS

Before delving into the EU, we turn to guiding principles: what is a treaty and what is a constitution?

A "treaty" is "a generic term embracing all instruments binding at international law concluded between international entities, regardless of their formal designation."<sup>4</sup> The Vienna Convention on the Law of Treaties defines "treaty" as "an international agreement concluded between States in written form and governed by international law . . ."<sup>5</sup> In short, treaties are contracts, between sovereign nations, governed by international law.

Constitutions share none of these attributes. A constitution is

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3. The parallels in the United States are hard to ignore. Those who advocate limited federal government, states' rights, and "federalism" as that term is presently understood tend to believe that the Constitution already places strict limits on federal power. Those who advocate a more expansive federal government tend to interpret the Constitution more broadly.

4. See United Nations Treaty Collection, Treaty Reference Guide, at <http://untreaty.un.org/English/guide.asp#treaties> (last visited Apr. 6, 2002).

5. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 2(1)(a), 1155 U.N.T.S. 331.

[t]he organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers. A charter of government deriving its whole authority from the governed.<sup>6</sup>

A constitution is not an agreement between states, but among a people to create a state. "The true difference" between "a *league* or *treaty*, and a *Constitution*," according to James Madison, is the difference between "a system founded on the Legislatures [or nation states] only, and one founded on the people."<sup>7</sup>

A constitution is the fundamental law of a nation, not a mere compact or contract. Constitutions "by definition establish[] the basic principles and laws of a *nation* or *state*; [while] an international treaty [or a compact] . . . specifies the contractual rights and duties of (more than one) distinct sovereign states."<sup>8</sup> These "basic principles" usually include certain fundamental rights of citizens, the right of free speech, freedom of religion, due process, etc. Constitutions also create powerful institutions (legislatures, courts, executives) with significant powers to interpret and enforce this fundamental national law.

And unlike treaties, constitutions are not governed by international law. A constitution, as the fundamental law within a nation, can be interpreted only according to the rules of the constitution itself.

### III. THE EUROPEAN UNION AS AN INTERNATIONAL ORGANIZATION

#### *A. The Community and Union Were Created by Treaties*

At first glance, both the EC Treaty and Treaty on European Union<sup>9</sup> ("TEU", collectively, "the Treaties") are plainly treaties. Formed shortly after the Second World War, the EC was created to integrate Europe so that war among European nations would become impossible.<sup>10</sup> Both

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6. BLACK'S LAW DICTIONARY 214-15 (6th ed. 1990) (citations omitted).

7. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787 533 (1969).

8. Steve J. Boom, *The European Union After the Maastricht Decision: Will Germany Be the "Virginia of Europe?"*, 43 AM. J. COMP. L. 177, 209 (1995).

9. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C224) [hereinafter TEU].

10. As stated by the European Union's official website:

In spring 1950 Europe was on the edge of the abyss. With the onset of the Cold War, the threat of conflict between its eastern and western halves loomed over the continent. Five years after the end of World War Two, the old enemies were still a long way from reconciliation. What could be done to avoid repeating the mistakes of the past and to create the right conditions for a lasting peace between such recent enemies? The nub of the problem

Treaties were created from the top down by acts of government, not "peoples." The EC Treaty (Article 313) and TEU (Article 52) were signed by European foreign ministers, required ratification by "the High Contracting Parties [participating European states] in accordance with their respective constitutional requirements," and entered into force upon "ratification by the last Signatory State."<sup>11</sup> The TEU entered into force after ratification by ten national legislatures or parliaments and three national referenda.<sup>12</sup> On the whole, the TEU received considerably more support in national legislatures of the member countries than among their own citizens.<sup>13</sup> Plainly "the European legal order started its life as an international organization in the traditional sense . . ."<sup>14</sup>

The Treaties' text supports this view. The Treaties refer to themselves as treaties, not as constitutions, nor as "basic" or "fundamental" law.<sup>15</sup> Both begin with "HIS MAJESTY THE KING OF THE BELGIANS" and other heads of signatory states, "leaving no room for doubt that the parties to [the Treaties] . . . are the sovereign states of Europe, not the 'people of Europe.'"<sup>16</sup> Their preambles aspire to an "ever closer union among the peoples of Europe," not a "state based upon a European people."<sup>17</sup> The EC Treaty "[r]esolve[s] to ensure the economic and social progress of [the participating] countries," and affirms "the constant improvements of the living and working conditions of their peoples."<sup>18</sup> The TEU delicately "[d]esir[es] to deepen the solidarity between [its] peoples while respecting their history, their culture, and their

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was the relationship between France and Germany. A link had to be forged between the two, and all the free countries in Europe had to be united around them so that they could work together on building a community with a shared destiny. It was Jean Monnet, with his unique wealth of experience as a negotiator and man of peace, who suggested to the French Foreign Minister, Robert Schuman, and the German Chancellor, Konrad Adenauer, that a community of interest be established between their countries . . .

Pascal Fontaine, *Seven Key Days In the Making of Europe*, at <http://europa.eu.int/abc/obj/chrono/40years/7days/en.htm>.

11. EC TREATY art. 313; TEU art. 52.

12. See Sophie Vanhoonacker, *From Maastricht to Karlsruhe: The Long Road to Ratification*, in *THE RATIFICATION OF THE MAASTRICHT TREATY* 3, 10-13 (Finn Laursen et al. eds., 1994). Denmark had one parliamentary vote and two referenda. See *id.*

13. See *id.* The Danish case is illustrative: after winning a 130-25 vote in parliament, the TEU suffered a narrow defeat in the initial referendum. See *id.*

14. J.H.H. Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order: Through the Looking Glass*, 37 HARV. INT'L L.J. 411, 419 (1996).

15. Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 HARV. INT'L L.J. 389, 393-94 (1996).

16. Boom, *supra* note 8, at 208.

17. Manfred Brunner v. The EU Treaty, BVerfGE 89, 188 (1993).

18. EC TREATY pmb. (emphasis added).

traditions," but makes plain that "[t]he Union shall respect the national identities of its Member States."<sup>19</sup>

The EU's history of ratification and the Treaties' text both suggest that these are traditional treaties among autonomous nation states.

### *B. Amendment/Withdrawal/Permanence*

Other features of the Union are also intergovernmental, not constitutional. The Treaties prohibit any amendment without ratification by every member state.<sup>20</sup> Such prohibitions are common in treaties, and the Vienna Convention on the Law of Treaties establishes this rule as the standard.<sup>21</sup> The rationale is plain: any amendment over a member's objection would irreparably violate national sovereignty. If a treaty is simply a contract among countries, no country can be bound by provisions to which it did not agree.

By the same token, sovereign nations must have the power to withdraw from treaties if their people so desire. Most treaties explicitly provide for withdrawal, if given with proper notice.<sup>22</sup> The TEU and EC Treaty are officially "concluded for an unlimited period."<sup>23</sup> No provision in the Treaties either authorizes or prohibits withdrawal by member states.<sup>24</sup> This omission is ambiguous. It could suggest that any member state may withdraw from the Treaties at any time, even without notice. Yet, as in constitutions—which often do not provide any mechanism for

19. TEU pmbl. *See also* TEU art. 6 (emphasis added).

20. *See* TEU art. 48; EC TREATY art. 308.

21. *See* Vienna Convention on the Law of Treaties, art. 40, U.N. Doc. A/CONF 39/27 (1969). "The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement." *Id.*

22. *See, e.g.,* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 65, 312 U.N.T.S. 221. "A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a Party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe . . ." *Id.* Treaty of Extradition, June 8, 1972, U.S.-U.K., art. XVI, 28 U.S.T. 227. "Either of the Contracting Parties may terminate this Treaty at any time by giving notice to the other through the diplomatic channel. In that event the Treaty shall cease to have effect six months after the receipt of the notice . . ." *Id.* Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, U.S.-Egypt, art. XIII, 21 I.L.M. 927. "Either Party may, by giving one (1) year's written notice to the other Party, terminate this Treaty at the end of the Initial ten (10) years period or at any time thereafter." *Id.* Agreement Establishing the World Trade Organization, art. XV, 33 I.L.M. 1143. "Any Member may withdraw from this Agreement. Such withdrawal shall apply . . . upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO." *Id.*

23. TEU art. 51; EC TREATY art. 312.

24. *See* MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 353 (1989).

states to withdraw<sup>25</sup>—the omission may also imply that no state may withdraw absent amendment to the Treaties themselves.

The Treaties' transitional nature, however, places them firmly within the category of treaties, not constitutions. Although the TEU and EC Treaties were explicitly "concluded for an unlimited period,"<sup>26</sup> both were substantially amended—the EC by the TEU and the TEU by the Amsterdam Treaty in 1997. The text of the TEU is transitional by its own terms. For example, the TEU's Common Foreign and Security Policy ("CFSP") calls for the "progressive framing of a common defence policy . . . which might lead to a common defence . . ."<sup>27</sup> The TEU resolves "to mark *a new stage* in the process of European integration," to "continue [not complete] the process of creating an ever closer union . . ."<sup>28</sup>

Constitutions are intended to be enduring, not transitional. Treaties are merely agreements among nations. They can be replaced or dissolved if enough signatory states withdraw. As transitional documents, the Treaties do not fit the constitutional bill.

#### IV. THE EUROPEAN UNION AS A SUPERSTATE

##### *A. European Union Powers*

The above discussion suggests that the Treaties are treaties like any other. They were signed and created by nation states, not a European people; they require unanimous agreement by all signatory states to amend; and they are transitional by their own terms. Why, then, did the European Court of Justice describe the EC Treaty as "the basic constitutional charter" of Europe?<sup>29</sup>

We begin with an analysis of EU powers. A constitution gives the central government vast powers.<sup>30</sup> The EU does not yet have the power to declare and conduct a war or to raise and support a European military. By its own terms, the TEU's CFSP aspires to but does not reach this goal.<sup>31</sup> Despite some efforts, European states have always rejected a

25. See, e.g., U.S. CONST.

26. TEU art. 51; EC TREATY art. 312.

27. TEU art. 17.

28. TEU pmbl.

29. Case 294/83, *Les Verts v. Parliament*, 1986 E.C.R. 1339. See also Opinion 1/91, 1991 E.C.R. 6079 (reaffirming the EC Treaty as "the constitutional charter of a community based on the rule of law.").

30. The United States Constitution, for example, gives the federal government the power to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. See U.S. CONST. art. I, § 8, cl. 1-3, 11-13.

31. Article 17 of the TEU, calling for the "progressive framing of a common defence policy . . . which *might* lead to a common defence," illustrates the CFSP's aspirational nature. TEU art.

common defense.<sup>32</sup> Nor can the EC lay and collect taxes directly from the people; EC nationals write no year-end check to a European Revenue Service.

Yet the EC does have substantial power. The Council can and has forced member states to pay the costs of participation in the Union (e.g., to absorb new member states or eliminate economic imbalances among member states)—costs ultimately borne by citizens of member states. That is a tax of a kind. The EC has the power to regulate commerce. The Community's common market objective is the source of enormous economic powers, distinguishing the EC Treaty from every other international treaty in history. The Community may regulate the movement of goods, labor, capital, and enterprise within the EC.<sup>33</sup> The Community establishes antitrust or "competition" law.<sup>34</sup> Pursuant to Article 95 of the EC Treaty, the Community may, by qualified majority, pass directives to harmonize laws of the member states that affect the internal market.<sup>35</sup> Such directives concern social and economic policy, including "health, safety, environmental protection, and consumer protection . . ."<sup>36</sup> The EC has used Article 95 to regulate the law of consumer contracts,<sup>37</sup> public works contracts,<sup>38</sup> tort liability for defective products,<sup>39</sup> copyright,<sup>40</sup> and trademark.<sup>41</sup>

As Jacques Rueff, former deputy governor of the Bank of France, stated in 1950, "Europe will be united by its money or it will never be made."<sup>42</sup> The last half century has proven Rueff's point. The EC has be-

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17 (emphasis added). Nor may the EU adopt a CFSP without unanimity on the Council. See TEU art. 23. It should be noted, however, that the Amsterdam Treaty, signed on October 2, 1997 largely in response to Europe's failed Yugoslavia policy, somewhat strengthened the CFSP. See *The Amsterdam Treaty: a Comprehensive Guide; Introduction*, at <http://www.europa.eu.int/scadplus/leg/en/lvb/a09000.htm>; *The Amsterdam Treaty: a Comprehensive Guide; Common Foreign and Security Policy*, at <http://www.europa.eu.int/scadplus/leg/en/lvb/a19000.htm>.

32. The most notable attempt, the European Defence Community, was rejected by the French National Assembly in 1954. See CLIVE C. CHURCH & DAVID PHINNEMORE, *EUROPEAN UNION AND EUROPEAN COMMUNITY* 15 (1994).

33. See EC TREATY arts. 25, 28, 29, 39, 43, 49.

34. See EC TREATY arts. 81-82.

35. See EC TREATY art. 95.

36. EC TREATY art. 95.

37. Council Directive 93/13, 1993 O.J. (L 95).

38. Council Directive 71/305, art. 1(a), 1971 O.J. SPEC. ED. (L 185/5) 682, *amended by* 89/440, 1989 O.J. (L 210/1).

39. Council Directive 85/374, 1985 O.J. (L 210/29).

40. Council Directive 91/250, 1991 O.J. (L 122/42).

41. Council Directive 89/104, 1988 O.J. (L 40/1), *amended by* 92/10, 1992 O.J. (L 6/35). See BLACKSTONE'S EC LEGISLATION 373-78, 378-86, 427-40, 453-57, 458-64 (Nigel G. Foster ed., 6th ed. 1995).

42. *Etching the Notes of a New European Identity*, INT'L HERALD TRIB. (Vienna), Aug. 3, 2001, at 1.



come a sort of economic constitution, "an economic giant but a political dwarf."<sup>43</sup>

### *B. Necessary and Proper Clause*

The EU is given additional power through the EC Treaty's "necessary and proper" clause, which states:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.<sup>44</sup>

Article 308 is extremely broad on its face. It authorizes the Community to take "appropriate measures" wherever necessary to "attain . . . one of the objectives of the Community," even where other articles have not provided the necessary powers. Under Article 308, the Council can look to the broad purposes of Articles 2 and 3 to enact Community law. Such objectives could include "raising . . . the standard of living and quality of life [in the EC],"<sup>45</sup> achieving "economic and social cohesion and solidarity among Member States,"<sup>46</sup> or even contributing to "the flowering of the cultures of the Member States."<sup>47</sup>

The European Court of Justice ("ECJ") has interpreted Article 308 expansively. The Court first defined "necessary" to allow the Council to rely upon Article 308 even where the Treaty has provided alternative legal bases.<sup>48</sup> The Court then took a broad "approach to the term[] 'objectives,'" considering Community objectives above and beyond any enumerated Treaty powers.<sup>49</sup> In *Massey-Ferguson*, citing the Community objective of "establish[ing] a customs union," the Court empowered the Council to create a "uniform determination of the valuation for customs purposes of goods imported from third countries."<sup>50</sup> Although not in the context of Article 308, the Court has also identified "European unity" as the "objective of all the Community treaties."<sup>51</sup> *Commission v. Council*

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43. NICHOLAS HOPKINSON, THE EUROPEAN UNION AFTER MAASTRICHT 21 (1992).

44. EC TREATY art. 308.

45. EC TREATY art. 2.

46. *Id.*

47. EC TREATY art. 3(1)(q).

48. See Case 8/73, *Hauptzollamt Bremerhaven v. Massey-Ferguson*, 1973 E.C.R. 897.

49. *Boom*, *supra* note 8, at 204.

50. *Hauptzollamt Bremerhaven*, 1973 E.C.R. at 907. Article 2 of the EC Treaty identifies the establishment of an "economic and monetary union" as a Community purpose.

51. Opinion 1/91, 1991 E.C.R. 6079-6080.

identified the "achievement of a people's Europe" and "strengthening the interaction between citizens in different Member States" as Community objectives.<sup>52</sup> The Court justified scientific research subsidies under Article 308, citing the need for "stimulation of training and mobility of researchers in the Community,"<sup>53</sup> presumably to strengthen the interaction between citizens in different member states.

The ECJ has not stood alone in its broad interpretation of Article 308. The member states and the Council also favor such expansive application. In the Paris Summit Conference of 1972, the member state governments "agreed that, for the purpose of carrying out . . . enlarged tasks . . . it is desirable to make the widest possible use of all of the provisions of the Treaties, including Article 235 [now Article 308] of the E.E.C. Treaty."<sup>54</sup> The Council based 491 Community acts exclusively or partially on Article 308 between 1973 and 1989 alone.<sup>55</sup>

On its face and as interpreted by the ECJ, Article 308 permits any Community legislation with a "nexus" to the "operation of a market,"<sup>56</sup> for example, "the purchase of equipment for national armed forces" to promote the "free flow of goods," or the "harmonization of diploma equivalences" to pursue the "free flow of persons."<sup>57</sup>

Perhaps the EU is not such a political dwarf after all.

### *C. The EU's Institutions*

Many treaties create or are enforced by institutions. The Agreement establishing the World Trade Organization created a Dispute Settlement Body to resolve disputes among nations.<sup>58</sup> The American Convention on Human Rights provides for an Inter-American Commission on Human Rights and Court of Human Rights.<sup>59</sup> Other treaties, such as the Convention on the Elimination of all Forms of Discrimination Against Women<sup>60</sup> and the Convention on the Rights of the Child,<sup>61</sup> create weaker institutions or no institutions at all.

52. Case 242/86, *Commission v. Council*, 1989 E.C.R. 1425, 1429.

53. *Id.*

54. Christoph Sasse & Howard C. Yourow, *The Growth of Legislative Power of the European Communities*, in 1 *COURTS AND FREE MARKETS* 92, 96 (Terrance Sandalow et al. eds., 1982).

55. See Boom, *supra* note 8, at 226 n.149.

56. EC TREATY art. 308.

57. Sasse and Yourow, *supra* note 54, at 96.

58. See Agreement Establishing the World Trade Organization, Apr. 15, 1994, annex 2, art. 1, 33 I.L.M. 1143.

59. See American Convention on Human Rights, Nov. 22, 1969, arts. 33-73, 9 I.L.M. 673.

60. See Convention on the Elimination of all Forms of Discrimination Against Women, Dec. 18, 1979, 19 I.L.M. 33.

61. See Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448.

But no treaty in history created institutions like those in the EU. The EU has four "branches" of government: a parliament, a supreme court, an executive branch, and a quasi-legislative council of member states. The Council, still the EU's main decision-making body, consists of representatives of the member governments. It exercises legislative power with the European Parliament, shares budgetary authority with Parliament, and on occasion concludes, on behalf of the EU, international agreements with one or more States or international organizations.

The Parliament is directly elected every five years by the people of Europe. It shares legislative power and budgetary authority with the Council and approves the nomination of Commissioners who collectively comprise the EU's executive branch.

The Commission consists of members nominated by common agreement of the member governments and approved by Parliament. As the EU's executive branch, the Commission initiates and presents draft legislation to Parliament and the Council, implements European legislation, ensures that Community law is properly applied, and represents the Union in negotiating international agreements.

These institutions are "endowed with sovereign rights, the exercise of which affects Member States and also their citizens."<sup>62</sup> Through Article 220,<sup>63</sup> the EC also became "the only treaty-based system equipped with a court which may be approaching the role of a constitutional court in a federal system."<sup>64</sup> The ECJ consists of justices appointed by common agreement of the member governments.

#### *D. Direct Effect of Community Law*

In addition to its vast powers and powerful institutions, the EU has a legal structure that is entirely constitutional in nature. As noted above, constitutions "by definition [establish] the basic principles and laws of a *nation* or *state*; [while] an international treaty [or a compact] . . . specifies the contractual rights and duties of (more than one) distinct sovereign states."<sup>65</sup> To establish such basic laws, constitutions apply a supreme federal law, enforceable by powerful federal institutions, directly to the people. The Community legal order embodies these constitutional principles.

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62. Case 26/62, *Van Gend & Loos*, 1963 E.C.R. 1, 12.

63. Article 220 provides: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." EC TREATY art. 220.

64. Terrance Sandalow & Eric Stein, *On the Two Systems: An Overview*, in 1 COURTS AND FREE MARKETS 1, 4 (Terrance Sandalow et al. eds., 1982).

65. Boom, *supra* note 8, at 209.

"The existence of direct relations between individuals and central institutions is . . . generally taken to be a defining characteristic of a federal system."<sup>66</sup> The famous *Van Gend & Loos* decision established the principle of direct effect of Community law,<sup>67</sup> reversing the "normal presumption of public international law whereby international legal obligations are . . . addressed to states."<sup>68</sup> Thus, Community law applies both (vertically) between member states and individuals and (horizontally) between private individuals.<sup>69</sup> Individuals are the "principal 'guardians' of the legal integrity of Community law" through the Article 234 preliminary ruling procedure, which permits individuals to rely on Community law in private suits and requires national courts to refer issues of Community law to the ECJ and defer to ECJ holdings concerning these Community laws.<sup>70</sup> The principle of direct effect and the preliminary ruling procedure remain generally accepted by courts of member states.<sup>71</sup>

### *E. Supremacy of Community Law*

A constitution must also establish the supremacy of federal law. *Costa v. ENEL* and subsequent decisions have established both the supremacy of Community law within its sphere of competence and the Community's "Kompetenz Kompetenz," or ability to *define* its sphere of competence.<sup>72</sup> Unlike treaties, EC law prevails over national laws passed later in time. Because the ECJ declared Community law "mandatory and absolute," "a legal system in its own right which forms part of the legal system of the Member States,"<sup>73</sup> member state courts must refuse to apply state laws that conflict with directly effective Community law.

66. Sandalow & Stein, *supra* note 64, at 15.

67. *Van Gend & Loos*, 1963 E.C.R. at 1.

68. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413 (1991).

69. It is not necessary to explore here the differences between regulations, directives, etc., which apply with horizontal and/or vertical direct effect under different circumstances. It is important only that the EU, *when it desires*, can create laws with vertical and horizontal effect.

70. Weiler, *supra* note 68, at 2414; TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 246 (2d ed. 1988). Article 234 of the EC Treaty provides in relevant part:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community . . . ; [and] (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

EC TREATY art. 234.

71. See Mark L. Jones, *The Legal Nature of the European Community: A Jurisprudential Analysis Using H. L. A. Hart's Model of Law and a Legal System*, 17 CORNELL INT'L L. J. 1, 48 (1984).

72. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585.

73. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E.C.R.

Although the EC Treaty contains no express "Supremacy Clause," the supremacy of Community law is rooted in the EC Treaty's text. Under Article 228, "[i]f the Court of Justice finds that a Member State has failed to fulfill an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice."<sup>74</sup> This Article implies the supremacy of Community law: why else would member states be required to fulfill Treaty obligations that could conflict with national laws?

Article 230 gives the ECJ judicial "review" over Community institutions to rule on their lack of competence or infringement of the Treaty. *Foto-Frost v. Hauptzollamt Luebeck-Ost* reiterated that national courts "have no jurisdiction to declare that acts of Community institutions are invalid."<sup>75</sup> *Foto-Frost* appealed to "the very unity of the Community legal order," to "the fundamental requirement of legal certainty," and to the ECJ's unique competence to interpret Community law.<sup>76</sup>

Article 234 gives the ECJ jurisdiction over "the interpretation of [the] Treaty" and requires the highest national courts to refer Community questions of law to the ECJ for preliminary rulings.<sup>77</sup> *Spa International v. Amministrazione Delle Finanze Dello Stato* reaffirmed Article 234's core purpose: "to ensure that community law is applied uniformly by national courts."<sup>78</sup> Although the ECJ can only interpret Community questions of law in cases referred by national courts, Article 234 imposes upon national courts "the obligation to refer a case for a preliminary ruling, as soon as the judge perceives either of his own option or at the request of the parties that the litigation depends on a [question of Community law]."<sup>79</sup>

Needless to say, no comparable provisions exist in any other treaty. This legal order—supremacy of Community law, direct effect of Community law upon individual citizens—is the stuff of nationhood and of true constitutions.

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629, 633.

74. EC TREATY art. 228.

75. Case 314/85, *Foto-Frost v. Hauptzollamt Luebeck-Ost*, 1987 E.C.R. 4199, 4199-200.

76. *Id.* at 4200.

77. EC TREATY art. 234.

78. Case 66/80, *Spa International v. Amministrazione Delle Finanze Dello Stato*, 1981 E.C.R. 1191; see also Case 166/73, *Rheinmuhlen v. Einfuhr*, 1974 E.C.R. 33, 38. "Article 177 [now Article 234] is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community." *Id.*

79. *Rheinmuhlen*, 1974 E.C.R. 33, 38.

# V. THE UNION: NEITHER INTERGOVERNMENTAL ORGANIZATION NOR SUPERSTATE

The EU in many ways looks like a constitutional superstate. EU law applies directly to EU citizens and supercedes the laws of member states. The TEU and EC Treaties are interpreted according to EU law (as set forth by the ECJ), not simply international law. The EU has a supreme court, an executive branch, and two legislative branches. It has vast powers not found in any other treaty.

Yet the EU was also created by "treaty" and almost entirely "founded on the Legislatures" and governments of nation states, not "on the people."<sup>80</sup> It is little wonder that commentators have struggled to place the EU in any historical, legal, or political context. Some refer to "constitutionally protected Community rights,"<sup>81</sup> others to Europe's "nascent federal system."<sup>82</sup> Others note that "while it is clear that the European Community is not a federal state, it is equally clear that it either has or reflects many such characteristics . . . . The European Community falls quite genuinely between the accepted categories of legal and political organization."<sup>83</sup>

The ECJ has had few problems characterizing the Community as a "new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields,"<sup>84</sup> with "its own legal system . . . of unlimited duration, having its own institutions, its own personality, its own legal capacity . . . stemming from a limitation of sovereignty or a transfer of power from the States to the Community"<sup>85</sup>—in short, as Europe's "basic constitutional charter."<sup>86</sup>

But there are weaknesses in characterizing the Community as a "constitutional charter." The "people of Europe" have yet to "adopt the existing text of the treaties as their own constitution . . . [b]y developing a custom and a corresponding *opinio juris* over time,"<sup>87</sup> an approach that would parallel the UK model.<sup>88</sup> And though national courts have, until

80. WOOD, *supra* note 7, at 533.

81. F.G. Jacobs, *Constitutional Developments in the European Community and the Impact of the Single European Market After 1992*, 11 MICH. J. INT'L L. 887, 894 (1990).

82. Sandalow & Stein, *supra* note 64, at 14.

83. John W. Bridge, *American Analogues in the Law of the European Community*, 11 ANGLO-AM. L. REV. 130, 137 (1982).

84. Case 26/62, *Van Gend & Loos*, 1963 E.C.R. 1, 2.

85. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 586.

86. Case 294/83, *Les Verts v. European Parliament*, 1986 E.C.R. 1339; *see also* Opinion 1/91, 1991 E.C.R. 6079 (reaffirming the EC Treaty as "the constitutional charter of a community based on the rule of law.").

87. Schilling, *supra* note 15, at 395-96.

88. *See id.* at 409 n.36. The Danish reaction to EC Treaty Article 17 (as amended by the TEU), establishing EU citizenship, is illustrative. Denmark issued a "Unilateral Declaration" accom-

recently,<sup>89</sup> unanimously accepted the principles of direct effect and supremacy of Community law, acceptance of constitutionalization in a period of unanimous decision-making in the Council is limited evidence of *opinio juris*. The ECJ decided *Van Gend & Loos*, *Costa* and *Simmenthal* long before the Single European Act shifted much Community decision-making to majority voting.<sup>90</sup> As Weiler notes:

Unlike the state governments of most federal states, the governments of the Member States, jointly and severally, could control the legislative expansion of Community jurisdiction/competences/powers. Nothing that was done could be done without the assent of all the States. This diffused any sense of threat and crisis on the part of governments [and courts] . . . . How convenient to be able to do in Brussels what would often be politically more difficult back home, and then exquisitely blame the Community!<sup>91</sup>

In addition, Article 308, the “necessary and proper” clause, does not create quite the political giant its broad text initially suggests. That is because Article 308 requires unanimity by the Council to pass legislation.<sup>92</sup> It is the unanimity of the member states, not Article 308, that is the ultimate source for the broad “Community” powers under this Article. Here the Treaties are again treaties, permitting autonomous nation states to pursue objectives of mutual interest when they unanimously agree to do so.

## VI. TOWARD A CONSTITUTION OF EUROPE?

The EU is a work in progress, part treaty and part constitution. In the past months, France and Germany have hinted at a new structure for Europe based upon a true constitution.<sup>93</sup> In order for Europe to adopt a constitution, it must do so honestly and openly. A European superstate or

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panying the TEU asserting that “Nothing in the [TEU] implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-state.” BLACKSTONE’S EC LEGISLATION, *supra* note 41, at 146-47. The declaration forced the Council to formally reassure Denmark that EU citizenship does not “in any way take the place of national citizenship.” *Id.* Note that Article 17 states explicitly that “Citizenship of the Union shall complement and not replace national citizenship.” *Id.*

89. See the “Maastricht” opinion of the German constitutional court, asserting the power of national courts to be the “final judge of the allocation of European and Member State competences.” *Manfred Brunner v. EU Treaty*, BVerfGE 89, 155, 187-88 (1993).

90. The Single European Act came into force on July 1, 1987.

91. Weiler & Haltern, *supra* note 14, at 444.

92. See Weiler, *supra* note 68, at 2483 n.120.

93. See, e.g., *Chirac Sets Sights on Euro Constitution*, BBC News (Aug. 28, 2001), available at [http://news.bbc.co.uk/1/hi/english/world/europe/newsid\\_1513000/1513080.stm](http://news.bbc.co.uk/1/hi/english/world/europe/newsid_1513000/1513080.stm); German President Johannes Rau, Address at the European Parliament in Strasbourg, at [http://www.bundespraesident.de/top/dokumente/Rede/ix\\_35628.htm](http://www.bundespraesident.de/top/dokumente/Rede/ix_35628.htm) (Apr. 4, 2001) (calling for a European constitution to create a federation of European nation states).

superfederation with a European constitution requires a conscious, informed decision by Europeans to cede national sovereignty. If any country desires to enter into such a state, its citizens—not its government—must choose to do so by referendum. No constitution can be ratified by “HIS MAJESTY THE KING OF THE BELGIANS,” et al. without the full participation and approval of the European people themselves.

Amendment of any such constitution cannot require the unanimous vote of constituent states. No political union, if it is to represent well the will of all states, can be held hostage to the desires of any single state. Similarly, the exercise of EU powers, including those under Article 308 necessary and proper to further EU objectives, should only require a majority or two-thirds support of the European people, not the unanimous vote of European states. For the EU to legislate in furtherance of Community objectives effectively, constituent states can have no veto.

It must also be understood that states may not under any circumstances secede from this union unless the union dissolves or is replaced. Constitutions, unlike treaties, are not optional or transitional legal obligations that can be renounced with a few months notice.

No true European state or federation can exist without a single mechanism to achieve a common foreign policy and defense. That means that European institutions—not Tony Blair and Jacques Chirac—will forge a common immigration policy, antiterrorism policy, and a common army with a single command structure and commander in chief.

It is not sufficient that Community law apply directly. The EU must also establish basic, individual rights for all European citizens, whether French, Italian, or German. Every constitution includes the equivalent of a Bill of Rights.

EU institutions must also be reorganized. What place does a Council of nation states have in a superstate or superfederation? Perhaps, at best, the Council can serve as Parliament’s upper chamber. The EU’s executive branch must also be directly accountable to the European people or Parliament, presumably in the form of a president or prime minister. If the EU is to be a superfederation or a superstate, its executive branch must be represented by a person directly accountable to Europeans, not a Commission of largely invisible, albeit well-meaning, bureaucrats.

These are significant changes, and Europe may not be ready for them politically, socially, or psychologically. Given the enormous historical, linguistic, cultural, and political differences among the ever-increasing group of EU nations, such a superstate created by a European constitution is unlikely and probably unworkable. Perhaps then the Union is best left substantially as is, neither treaty nor constitution, neither nation nor federation. In its present state, Europe will continue to realize the bene-



fits of economic union without facing the psychological crisis and political division any substantial loss of national sovereignty would inevitably create. Such a Union not only benefits Europe; it is a Union to which all Europeans can agree.

## Appendix A: Table Of Selected TEU and EC Treaty Articles Renumbered by the Treaty of Amsterdam

Article # Before Amsterdam Treaty	Article # After Amsterdam Treaty
<b>EC Treaty</b>	
7a	14
8	17
12	25
30	28
34	29
36	30
48	39
52	43
55	45
59	49
75	71
85	81
86	82
100a	95
104	101
104c	104
113	133
119	141
164	220
171	228
173	230
177	234
223	296
235	308
238	310
240	312
247	313
<b>TEU</b>	
R	52
F	6
N	48
Q	51
L	46